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10 UNITED STATES DISTRICT COURT  
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
12

13 UNITED STATES OF AMERICA,	)	Case No. SA CR 06-129-AG
	)	
14 Plaintiff,	)	GOVERNMENT'S OPPOSITION TO
	)	DEFENDANT'S REQUEST FOR
15 v.	)	DECLARATORY RELIEF;
	)	ATTACHMENTS
16	)	
	)	
17 EDWARD SHOWALTER,	)	
	)	
18 Defendant.	)	
	)	
19 _____	)	

1 **I. INTRODUCTION**

2 Defendant Edward Showalter ("defendant") stands convicted of  
3 a single count of wire fraud. This conviction results from a  
4 guilty plea taken by this Court on September 25, 2006.

5 Defendant seeks relief premised on a allegation the  
6 government breached the plea agreement. Defendant claims that  
7 "[d]uring the second and final sentencing hearing in this matter  
8 on March 3, 2008"<sup>1</sup> the government recommended a mid-range  
9 sentence when the plea agreement entered by the parties required  
10 a it to make a low-end recommendation.

11 Under the plea agreement, the government only had an  
12 obligation to recommend a low-end sentence "[i]f defendant  
13 complies fully with all defendant's obligations under this  
14 agreement." Plea Agreement ¶ 16. Because defendant had not  
15 complied fully with his obligations under the plea agreement, and  
16 had "repudiated" the agreement," the government's obligation to  
17 make a low-end sentencing recommendation never arose.

18 **II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND**

19 **A. The Plea Agreement**

20 Defendant pleaded guilty pursuant to a written plea  
21 agreement on June 26, 2006. ("Plea Agreement" or "Plea") (CR 6)  
22 (Attachment A.) The Plea Agreement contained mutual obligations  
23 that the parties would undertake. Defendant obligated himself to  
24 "plead guilty" and "not knowingly and willfully fail to abide by  
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26 <sup>1</sup> In fact, the government recommended a midrange 151-month  
27 sentence in its written sentencing position filed in advance of  
the hearing. (CR 53.)

1 all stipulations contained in this agreement." Plea ¶ 15.  
2 Included in those "stipulations" defendant agreed to abide by was  
3 a "stipulated" factual basis. Id. ¶ 9 ("Defendant and the USAO  
4 agree and stipulate to the statement of facts provided below.")  
5 Also included was a sentencing stipulation to a minimum loss  
6 amount of one million dollars and at least 10 victims. Id. ¶ 12.  
7 ("Defendant and the USAO agree and stipulate to the following  
8 applicable sentencing guideline factors: . . .") Defendant also  
9 agreed that he was factually guilty of the charges. Id. ¶ 2  
10 ("Defendant admits that defendant is, in fact, guilty of this  
11 offense described in the indictment.").

12 As part of the plea agreement, the government agreed to  
13 recommend a low-end sentence only "[i]f the defendant complies  
14 fully with all of defendant's obligations under this agreement,  
15 the USAO." Id. ¶ 16.

16 B. Defendant Breaches The Plea Agreement By Declaring  
17 Himself Factually Innocent

18 On April 16 and 17, 2007, defendant filed a motion and  
19 supporting declarations seeking to withdraw his guilty plea.  
20 Defendant, in his supporting declaration, stated that "I am  
21 indeed not guilty of having devised any scheme to defraud any of  
22 my lenders." Showalter Declaration ¶ 7 (Attachment B.) This  
23 claim contradicts the plea agreement where defendant "admits that  
24 defendant is, in fact, guilty of this offense described in the  
25 indictment." Plea Agreement ¶ 2. Defendant's declaration also  
26 contradicts defendant's stipulated factual basis:

1 Defendant, acting with the intent to defraud, diverted  
2 the money he obtained from investors for a variety of uses,  
3 including other investments, High Park operating expenses,  
4 and personal use. As a result of this scheme defraud,  
5 Defendant victimized at least 10 people an caused a loss of  
6 at least \$1 million but not more than \$20 million.

7 As part of defendant's scheme to defraud, defendant  
8 caused an interstate wiring from Washington Mutual Bank in  
9 California to Bank of China, in New York, on or about June  
10 6, 2005.

11 Plea ¶ 9. The Court denied defendant's efforts to withdraw his  
12 guilty plea, a decision which was later affirmed by the Ninth  
13 Circuit.

14 C. Defendant Breaches The Plea Agreement Again By  
15 "Repudiating" his Factual Basis and Arguing "There  
16 Is No Loss"

17 Defendant filed his initial sentencing position on October  
18 15, 2007 (CR 51) (Attachment C.) Defendant's sentencing position  
19 begins by noting that he "repudiated the factual basis in the  
20 plea agreement when he sought to withdraw his guilty plea on  
21 April 16, 2007." Id. at 2. Defendant then goes onto argue that  
22 "there is no loss" despite stipulating to at least \$1 million in  
23 loss in the plea agreement. Compare id. at 15 to Plea at ¶¶ 9  
24 and 12 ("As a result of this scheme defraud, Defendant victimized  
25 at least 10 people an caused a loss of at least \$1 million but  
26 not more than \$20 million.")

27 On November 28, 2007, the government filed its  
28 sentencing position recommending that defendant be sentenced to  
151-months, the mid-point of the guideline range.

#### D. Defendant's Sentencing Hearings and Appeal

The Court held two sentencing hearings for defendant: one on December 3, 2007 and one on March 3, 2008. At the outset of the first sentencing hearing, defendant's counsel reiterated that "our first and a priori position is there is no loss, that there are no victims." 12/3/2007 RT 11 (Attachment D.)

The government, at both hearings, reiterated its recommendation for a 151-month sentence. At no time during either hearing did defendant claim that the government's recommendation was a breach of the plea agreement which defendant has previously "repudiated."

After being sentenced to 151-months, defendant appealed. On appeal defendant did not claim any breach of the plea agreement.

### III. ARGUMENT

A. The Government's Obligation to Recommend a Low-End Sentence Never Arose

As is set forth by defendant's motion, "[p]lea agreements are contractual in nature and are measured by contract law standards." United States v. De La Fuente, 8 F.3d 1333, 1337 (9th Cir. 1993). By the terms of the plea agreement contract, the government's obligation to recommend a low-end sentence arises only "[i]f defendant complies fully with all defendant's obligations under this agreement." Prior to making a sentencing recommendation, defendant had not fully complied with his obligations under the plea agreement. To the contrary, defendant breached those obligations multiple times:

Defendant's Position	Language In the Plea Agreement
<p>"I am indeed not guilty of having devised any scheme to defraud any of my lenders." Showalter Declaration ¶ 7 (Attachment B)</p>	<p>"Defendant admits that defendant is, in fact, <u>guilty</u> of this offense described in the indictment." Plea ¶ 2 (Attachment A)</p> <p>"Defendant, <u>acting with the intent to defraud</u>, diverted the money he obtained from investors for a variety of uses". As a result of this <u>scheme defraud</u>, Defendant victimized at least 10 people an caused a loss of at least \$1 million but not more than \$20 million. Plea ¶ 9</p>
<p>"Mr. Showalter repudiated the factual basis in the plea agreement when he sought to withdraw his guilty plea on April 16, 2007." Defendant's October 15, 2007 Sentencing Position at 2 (CR 51) (Attachment C.)</p>	<p>"Defendant and the USAO agree and stipulate to the statement of facts provided below." Plea ¶ 9.</p>

Defendant's Position	Language In the Plea Agreement
<p>Defendant argues that "there is no loss." Defendant's October 15, 2007 Sentencing Position at 15 (CR 51) (Attachment C.)</p>	<p>"As a result of this scheme defraud, Defendant victimized at least 10 people an caused a <u>loss of at least \$1 million</u> but not more than \$20 million." Plea ¶ 9</p> <p>"Defendant and the USAO agree and stipulate to the following applicable sentencing guideline factors:. . . <u>Loss greater than \$1 million.</u>" Plea ¶ 12</p> <p>"[E]ach party agrees to maintain its view that the calculations in paragraph are minimum adjustments consistent with the facts of this case." Plea ¶ 14</p> <p>"To not knowingly and willfully fail to abide by all sentencing stipulations contained in this agreement." Plea ¶ 15</p>

Defendant's Position	Language In the Plea Agreement
<p>"Our first and <i>a priori</i> position is there is no loss, that there are no victims." 12/3/2007 RT 11 (Attachment D.)</p>	<p>"As a result of this scheme defraud, <u>Defendant victimized at least 10 people and caused a loss of at least \$1 million</u> but not more than \$20 million." Plea ¶ 9</p> <p>"Defendant and the USAO agree and stipulate to the following applicable sentencing guideline factors: . . . <u>Loss greater than \$1 million. . . [and] More than 10 victims.</u>" Plea ¶ 12</p> <p>"[E]ach party agrees to maintain its view that the calculations in paragraph are minimum adjustments consistent with the facts of this case." Plea ¶ 14</p> <p>"To not knowingly and willfully fail to abide by all sentencing stipulations contained in this agreement." Plea ¶ 15</p>

Under the terms of the plea agreement, the government was obligated to make a low-end sentencing recommendation only if defendant fulfilled his obligations under the plea agreement. As defendant did not do so, the government's obligation to recommend a low-end sentence never arose.

B. Defendant Breached the Plea Agreement

In the alternative, the government requests that the Court find that defendant breached the plea agreement prior to filing of the government's initial sentencing position. Such a finding would make explicit what the parties clearly believed at the time of the first sentencing: that defendant was no longer abiding by



1 the plea agreement and did not expect the government to either.

2 The plea agreement required the government to have the Court  
3 declare a breach prior to being relieved of its obligations under  
4 the agreement. Here, because defendant had not fulfilled any of  
5 his obligations under the plea agreement the government's  
6 position is that its obligation to recommend a low-end sentence  
7 never arose. Plea ¶ 16 ("[i]f the defendant complies fully with  
8 all of defendant's obligations under this agreement, the USAO  
9 agrees" to make certain recommendations including for a low-end  
10 sentence). In retrospect, and in an abundance of caution, the  
11 government acknowledges that it probably should have asked for  
12 the Court to declare that defendant breached the plea agreement  
13 when he: (1) repudiated his factual basis; (2) claimed factual  
14 innocence; and/or (3) when he took the position that there was no  
15 loss and no victims. It now asks for the Court to find that  
16 defendant breached the plea agreement prior to the claimed breach  
17 by the government for the reasons set forth above.

1 **IV. CONCLUSION**

2 For the reasons set forth above, defendant's motion should  
3 be denied.

4 Dated: March 4, 2011

Respectfully submitted,

5 ANDRÉ BIROTTE JR.  
6 United States Attorney

7 /s/  
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Assistant United States Attorney

9 Attorneys for Plaintiff  
10 United States of America  
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